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No. 03-1259

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

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Shenker v. Baltimore & Ohio Railroad, 374 U.S. 1 (1963), holds that a jury may find a railroad liable for damages under the FELA if the railroad fails to "inspect" the third-party premises where its employees work. *Id.* at 8. The *Shenker* rule applies *regardless* of whether the railroad had control over the property or prior knowledge of the particular danger that caused injury. Indeed, in *Shenker*, the Court noted that the third party's railcar that injured the plaintiff "had just pulled into the station," so that the railroad could not have known in advance of the defect in that car. *Id.* at 7.

Respondent NS concedes that it failed to undertake *any* inspection of U.S. Silica's premises for pipes that ran under the rail tracks, but asserts that its failure is legally irrelevant. *See* Opp. 8. The state supreme court erroneously agreed, overturning the verdict of a properly instructed jury on the ground that NS could not be "omniscient" as to latent dangers on U.S. Silica's premises. Pet. App. 7a. Under that ruling, a railroad has no duty to inspect to *discover* latent dangers, but is responsible for addressing only those risks of which it is actually aware.

That holding is squarely contrary to *Shenker*, as well as the multiple federal circuit courts and state supreme courts that have read *Shenker* as requiring inspection of all areas where the railroad employees are directed to work to discover whether there are dangers that might harm those employees. Under *Shenker*, it is not enough to say that the railroad did not know of a danger. Accordingly, if this case had arisen in the numerous courts that have applied *Shenker* in third-party premises cases, the jury's verdict would have been affirmed. *See* Pet. 12-15. The dangerous condition here was plainly on property NS "required" Rogers to "use" (Opp. 18) – Rogers was sent to inspect the hole, and he was injured at the edge of that hole because of the dangerous condition that NS never discovered. *Shenker* requires nothing more to impose liability. The decisions that have followed *Shenker* cannot

be reconciled with the decision below (and *Seaboard System Railroad v. Coffee*, 565 So. 2d 35 (Ala. 1990)).

In opposing certiorari, NS flatly misstates the holdings of *Shenker* and the cases that have applied it in third-party roadbed hazard and property cases. NS avoids addressing the proper and unobjected-to jury charge, which required the jury to decide that NS "knew" or "should have known" of the dangerous condition before exposing Rogers to it. And NS ignores the evidence *supporting* the jury verdict (preferring instead a recitation of *its* evidence that the jury soundly rejected).

Given that the law is so clearly against its position, NS's Opposition fires a lot of shots with loud bangs as to the factual record, but they turn out to be blanks. NS presents a legally untenable waiver claim, and it posits a self-serving version of the facts that is not only irrelevant – because NS does not dispute that it never inspected the premises for pipes that caused Rogers' injury – but also contrary to facts that were credited by both the jury and the trial judge that actually heard the evidence. Ultimately, it matters greatly that the South Carolina Supreme Court diverged from this Court's precedents and the decisions of other courts on a legal issue of monumental importance to hundreds of thousands of rail workers: whether the FELA imposes on the railroad a duty to inspect a third party's premises to ensure a safe workplace where it sends a rail worker.

I. THE OPPOSITION CONFIRMS THAT THE JUDGMENT BELOW IS CONTRARY TO NUMEROUS DECISIONS

a. In *Shenker*, the railroad argued that it could not conceivably have had notice that the third party's railcar was defective "because [the third party's] train had just pulled into the station, [and] the [employer] did not have sufficient opportunity to obtain actual or constructive notice of the [defect]." 374 U.S. at 7-8. This Court rejected the railroad's assertion that it had no duty to inspect, holding that the railroad's duty was either to inspect the

third party's property or to "refus[e] to permit its employees to service" a car not under its control. *Id.* at 10.

NS makes the very same argument here that *Shenker* rejected. Endorsing the state supreme court's claim that NS could not be "omniscient," Pet. App. 7a, NS contends that, because it could not have reasonably known about this danger, it had no duty to inspect U.S. Silica's premises to discover whether any such latent threat existed. *See* Opp. 1 (arguing that the question here is whether "Norfolk Southern knew or should have known" about the pipes). Thus, by its own confusion about the governing FELA standard, NS further demonstrates the judicial conflict that needs resolution by this Court.[1]

Unable to square its position with *Shenker*, NS offers a crabbed view of that decision as applying only to "third-party property that [a railroad] required its employees to use" – and then suggests that it only required its workers to use the U.S. Silica spur track and not the immediately adjacent property around it. Opp. 18.[2] But the unsafe condition here *did* affect the safety of the spur track – indeed, the pipes at issue ran under the tracks, which is why industry standards adopted by NS required them to be cased. *See* Pet. 3-4. And by sending Rogers to inspect the hole, NS just as surely "required" him to "use" the property around that hole as the railroad in *Shenker* did

---

[1] Remarkably, NS seems to think that a *legal encyclopedia* on general negligence duties (Opp. 18) is more persuasive authority than *Shenker*, which announces a more stringent standard under the FELA. *See* 374 U.S. at 8. That stricter standard affords added protections to workers in this highly dangerous employment setting. *See* Pet. 8.

[2] NS similarly asserts that, because the underlying facts in this case concern "slurry pipelines," the principle of a non-delegable duty to provide a safe workplace is somehow less relevant. If anything, this Court's guidance is needed all the more because if railroads can ignore their industry standards with impunity – as NS did here – rail workers will be subjected to ever greater threats to their safety. In any event, this case, like those cited in the Petition (at 12-15), involves the general duty to inspect third-party property to ensure railroad employees a safe place to work.

when it required its employee to "use" the other railroad's car that caused his injury. Indeed, NS *concedes* that Rogers was "assigned" by his supervisor to inspect both "the track and the hole underneath it," which necessarily required him to "use" the property around that hole. Opp. 3. NS thus offers no meaningful distinction with *Shenker*.

Even if NS is correct that the decision below rests on a more limited understanding of *Shenker*, that simply underscores the conflict between the decision below and *Seaboard System*, and the lower courts that have *not* so viewed *Shenker*. In *Nivens v. St. Louis Southwestern Railway*, 425 F.2d 114 (1970), the Fifth Circuit held that, having failed to undertake an inspection, the railroad was liable for a defect in the roadbed underneath the tracks, even though that roadbed was designed and controlled by third parties. *See id.* at 120 ("The railroad had a positive duty to inspect and to discover defects from the date it permitted its employees to travel on the roadbed."). Likewise, NS here also had a duty to discover a defect that both was under the tracks *and* affected the part of the property that it required Rogers "to travel on."

Similarly, in *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299 (8th Cir. 1990), the railroad's duty to inspect was found to extend as far as a boarding house where its employees were required to stay and included an obligation to inspect the stairs to that facility to ensure that they would not be icy and unsafe. *See id.* at 303-04 ("[t]he railroad's nondelegable duty [to provide a safe workplace] extends to the property of third parties and includes an obligation to inspect the premises of the third party"); *see also Norfolk & Western Ry. v. Chittum*, 468 S.E.2d 877, 881 (Va. 1996) ("The employer also has a nondelegable duty to inspect its premises and other areas where its employees are required to work and to take reasonable precautions to protect its employees from possible danger.").

Contrary to NS's argument, none of these cases interprets *Shenker* as imposing a duty to inspect only a limited portion of the property on which a railroad directs its

employees to work (here, in NS's view, the spur track, *see* Opp. 18). They all stand for the proposition that the duty to inspect extends to "the entire pertinent premises," Opp. 19 – that is, all areas where employees are directed to go. Likewise, none of those cases views *Shenker* as irrelevant to articulating the railroad's duty simply because that case dealt with another carrier's railcar rather than a third party's real property.

NS's attempt to characterize our argument as leading to absurd results has no merit. *See id.* If NS had an argument that Rogers' injury was not reasonably foreseeable or that the dangerous condition could not have been discovered by reasonable inspection, *see* Opp. 20, it was certainly free to argue that to the jury. *Nivens*, 425 F.2d at 118 ("[T]he plaintiff still has the burden of proving . . . that the employer, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury; foreseeability is an essential ingredient of negligence under the Act.") (quotation marks omitted).

b. Notwithstanding the jury's rejection of its arguments, NS persists in arguing its own version of the facts and ignores evidence the jury reasonably credited. In so doing, it ignores the unobjected-to jury charge, which properly instructed that before the "railroad can be charged with the negligence in failing to provide a reasonably safe place to work plaintiff must prove that the defendant railroad knew or in the exercise of ordinary care *should have known* that an unsafe condition existed." R. 1005 (emphasis added) (App., *infra*, 15a). The trial court later instructed the jury that "it is the duty of the railroad to use ordinary care and prudence in furnishing its employees a reasonably safe place in which to work and to use reasonable precaution to maintain and keep such place in a reasonably safe condition commensurate with the amount of danger which the railroad knew or in the exercise of due care *should have known* existed in the place where its employees work." R. 1008 (emphasis added) (App., *infra*, 15a-16a). NS did not object to those

instructions, R. 1026 (App., *infra*, 16a), which both correctly state the law and properly put before the jury NS's failure to ensure (through proper inspection) that Rogers had a safe place in which to work.

Once the properly instructed jury found liability under the FELA, this Court's precedents preclude overturning that judgment "in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957) (footnote omitted). *See* Pet. 20-21. By changing the FELA negligence standard so that railroads no longer have a duty to inspect third-party premises to discover latent defects that may cause injury or death, the decision below improperly invaded the province of the jury by announcing a legal standard (*viz.*, "omniscience") that departs dramatically from the holdings of this and numerous federal and state courts.

c. The facts amply supported the jury's verdict that NS was negligent. In arguing that "Rogers adduced no facts probative . . . of Norfolk Southern's notice of slurry pipes underneath the track," Opp. 20, NS offers a highly slanted view of the evidence, as though the losing party before the jury is entitled to have this Court draw inferences in *its* favor. But *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946), long ago held that a reviewing court invites reversal by disregarding evidence that supports the jury's verdict.

For instance, NS stridently protests that it could not reasonably have known about the existence of the pipes and accuses Rogers of mischaracterizing the record to suggest otherwise. *See* Opp. 8-10. Its claim is as wrong as it is irresponsible. Testimony demonstrated that the slurry pipes were visible both going into the ground adjacent to the sidetrack and coming out of the ground on the opposite side of the track.[3] NS mocks the use of photo-

[3] Photographs and witness testimony revealed pumping equipment and the beginning of a slurry pipe going underground 20 feet from the

graphic evidence (Opp. 9-10), but the jury – whose role it is to evaluate such arguments – obviously found NS's mischaracterizations inconsistent with the other evidence.

That other evidence included testimony that this was a sand plant with pumping equipment 20 feet from the track in which plastic pipes were obviously used to convey material and that those pipes might run under the tracks. Indeed, in closing argument, Rogers' counsel reminded the jury of Exhibit 7, in which NS had told U.S. Silica that it was "agreeable" "to the construction and maintenance that use the facility [*i.e.*, the track] over, across *or under*." R. 960 (emphasis added) (Resp. Add. 22a-23a). As the trial court understood, a jury could conclude that NS at least had a duty to inquire whether pipes ran under the tracks and, if so, whether such pipes were encased according to industry-standard regulations. *See* Pet. App. 28a.[4]

Indeed, NS here flip-flops from the dispositive concession made by its trial attorney, who conceded that there was evidence from which a jury might determine that NS was negligent in not ensuring that U.S. Silica followed the relevant regulations:

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sidetrack. R. 89-90, 114-15, 1097 (Pet. App. 53a-56a). The 8 and 9 slurry lines were exposed for a distance of approximately one-quarter mile after coming out of the ground on the other side of the track. R. 115, 1097 (Pet. App. 55a). The wet processing center for the slurry operation itself is adjacent to the tracks. R. 129, 1103 (App., *infra*, 2a). The very nature of the facility and the absence of any other apparent means of conveyance across the track were sufficient to put NS on inquiry notice of the use of pipes. R. 1097-1106.

[4] The testimony also showed that Rogers was responsible only for track inspection, and not inspection of areas under which pipelines would have run nearby; that the pipeline would have needed replacing every two years or so; and that Rogers had only been assigned to do track inspections for approximately 18 months. R. 214, 668-69 (App., *infra*, 3a, 9a-11a). From those facts, a jury reasonably could have inferred that someone at NS (other than Rogers) should have been aware of the slurry pipeline, that it posed a latent danger, and that the railroad was negligent in failing to do anything about it. *See* R. 802 (testimony by Rogers' supervisor that pipes and casing requirements were beyond the scope of Rogers' duties) (Pet. App. 67a-68a).

> The Court: They have a duty under the FELA to maintain a safe working place for their employees, don't they?
>
> Mr. McMaster: Yes sir, they do. They do that, but, again, there must be some evidence of negligence.
>
> The Court: Well, isn't there facts in which it could be inferred that they breached their duty to require the codefendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?
>
> Mr. McMaster: I think Mr. Dunn [plaintiff's expert engineer] said that or something like that.

R. 908 (App., *infra*, 14a).[5]

The railroad's theory here – that the pipeline was built *after* the tracks had been laid, so NS could not have known of its existence – could have persuaded only a comatose jury. Under NS's theory, even though testimony revealed that a NS train services the silica plant three times a week (R. 126 (App., *infra*, 1a)), no rail supervisor noticed that a pipeline was being constructed *underneath the track*. NS's *post-hoc* theories of its evidence are as unpersuasive now as they were to the jury that rejected its case.

Testimony further established that NS had a continuing duty to ensure compliance by a company like U.S. Silica with its regulations (which included encased pipes). Thus, when U.S. Silica did build the track, that continuing obligation required it to inform the railroad of any

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[5] Indeed, Dunn testified without objection that there was ample evidence that the pipe had been replaced numerous times (R. 352-53), that water could create a hole with a cavern effect (R. 359), that NS's actions would be "in violation of its own guidelines" (R. 390), and that the railroad "obviously" would have a duty to know "if a shipper clandestinely or otherwise installed a pipe structure under its operating track" (R. 319). *See* App., *infra*, 6a-9a. The jury could determine NS's negligence wholly independent of U.S. Silica's negligence.

change to subterranean conditions – and NS to ensure that such standards were being met. R. 570 (Pet. App. 62a-63a). But testimony revealed that NS was "not sure" whether it had "a record of any plans and specifications at U.S. Silica." *Id.*

II. THERE HAS BEEN NO WAIVER HERE

NS tries to conjure up a "vehicle" problem by repeatedly asserting that Rogers never argued at trial that NS breached its duty of providing a safe workplace by failing to discover and inspect the unencased slurry pipes. *See* Opp. 22-23. That assertion is both untrue and irrelevant. A court looks at the *evidence* of negligence and not counsel's theories in presenting that evidence. *Lavender*, 327 U.S. at 652-53. NS made that tired argument twice to the state appellate courts, neither of which found it persuasive and both of which addressed Rogers' safe workplace claim. *See* Brief of Respondent at 12-13 (S.C. filed Oct. 31, 2001); Brief of Appellant at 29 (S.C. Ct. App. filed June 29, 1999); Reply Brief of Appellant at 5-6 (S.C. Ct. App. filed June 29, 1999). The standard for whether an issue is properly presented to this Court is whether it was "pressed in or passed on" by the court from which certiorari is sought. *See, e.g., United States v. Wells*, 519 U.S. 482, 488 (1997) (internal quotation marks and brackets omitted). That standard is self-evidently satisfied here. Pet. App. 16a (Rogers "contends Norfolk sent him to an unreasonably unsafe place to work.").

In any event, the closing argument amply demonstrates that Rogers presented a safe workplace theory: "[T]he railroad is required to give him a reasonably safe place to work . . . . [T]hey are supposed to take care of him and have a safe place to work for him wherever he goes. And that duty, that entitlement to that right is Dave Rogers'." R. 956 (Resp. Add. 19a). Counsel further stated that Rogers had the "right to expect a safe place to work," that NS has known about this rule, and that its attempts to shirk its duty and avoid liability by claiming that it had no notice of this problem "is like an ostrich burying his

head in the sand." R. 956, 957, 959 (Resp. Add. 19a-21a). That statement was a direct allusion to testimony that the railroad's engineers had failed to ensure compliance with AREA regulations, Rogers' supervisor was negligent in performing inspection duties, and the railroad workers tasked with pipeline inspection had failed in their duties – all of which had been laid before the jury in direct and cross-examinations. It was also a reference to testimony that the engineer at the scene of Rogers' accident saw the concave cavity before Rogers approached, failed to warn him, acknowledged that Rogers could not have perceived the danger from the angle he approached, and testified that a U.S. Silica employee told him that such cavities had formed before. R. 254-55 (App., *infra*, 4a-6a). Finally, Rogers' counsel argued to the jury that "[i]t is not a defense to say we don't know when you refuse to learn." R. 959 (Resp. Add. 21a).

NS's brazen and self-serving reconstruction of its trial evidence aside, this case presents a straightforward legal error. The state supreme court ruled as a matter of law that a railroad has no duty to inspect a third party's property for latent defects. Numerous federal courts have held that FELA imposes such an obligation on the employer. A properly instructed jury concluded from the evidence that the railroad was negligent, and the state appellate courts applied an erroneous legal standard to invade the province of the jury. On both counts, the decision below smacks head-on into established precedent. Because four decades ago this Court in *Shenker* rejected the very notion that a railroad does not have a duty to inspect a third party's premises where it sends its workers, this Court should either summarily reverse or grant plenary review to determine the scope of *Shenker*'s holding.

* * * * *

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 2004

APPENDIX

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

TRANSCRIPT OF RECORD
(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * *

[Testimony of James Willard Holmes, Tr. 188, R. 121]

* * *

[Tr. 193, R. 126]

* * *

Q. And did you understand the railroad switched your plant on a regular basis?

A. At that time the standard procedure was to switch Mondays, Wednesdays and Fridays and, you know, if we needed another switch either Tuesday, Thursday or Saturday, that could occur.

* * *

[Tr. 196, R. 129]

Q. How big is the pipe?

A. Eight inch.

Q. An eight inch pipe. What I am getting at is if that eight inch pipe running under that state highway ruptures it couldn't do anything bad to the highway because it's inside a tunnel.

A. That's correct.

Q. All right and then where does that eight inch slurry pipe go?

A. It goes to a raw sand tank which holds maybe two or three hundred tons of material.

Q. And I am going to show you what is marked as Exhibit Number 7, which has been admitted into evidence as Number 7, and ask you if you would tell the ladies and gentlemen of the jury –

A. I have got to have these.

Q. You are doing fine except they can't see.

A. Oh, I'm sorry.

Q. This is the wet process?

A. That is the wet processing building.

Q. Now there's a marker on here, is that the eight inch pipe that runs under the state highway?

A. Yes, it is.

Q. And runs across the top of the ground here?

A. Yes, it does.

* * *

[Testimony of William Brown (By Deposition), Tr. 277, R. 210]

* * *

[Tr. 281, R. 214]

Q. And this pipe, this four inch polyurethane pipe, it had broken before and caused holes in it?

A. Yes, sir.

Q. And this happens on a fairly – and I don't mean every day, but I mean on a fairly regular basis, it's something you know is going to happen?

Mr. Tucker: Line 5

A. Well, are you just specifically talking about the 8 and 9 line or . . .

Q. Yes, the polyurethane pipe.

A. No, sir, it's a pretty durable pipe. And this pipe that we're talking about now has probably been in there since a year and a half. I don't think we've replaced it since then.

Q. Would you say that it fractures then maybe every year and a half to two years?

A. Yes.

* * *

[Testimony of Anthony Earl Samuels, Tr. 290, R. 223]

* * *

[Tr. 321, R. 254]

Q. Okay and it was not anybody from U.S. Silica that you needed to get out there?

A. No.

Q. It was somebody from your railroad.

A. Correct.

Q. And as Mr. Rogers approached the hole and you knew that the hole that he was approaching from his side curved to some extent, did it occur to you at any time to say, Mr. Rogers, watch out for that hole?

A. No, it didn't occur to me at all.

Q. At all? What not?

A. It just didn't.

Q. Why?

A. It just didn't.

Q. Did you assume that Mr. Rogers knew what he was doing?

A. Yes.

Q. Did you assume that Mr. Rogers would appreciate as you did the hole?

A. Appreciate what?

Q. Appreciate the condition he was inspecting.

A. I just didn't see that happening at the time.

Q. No, no, no, I said did you assume Mr. Rogers being the inspector and the investigator sent to investigate this hole would recognize the hole as you did?

A. Not from the side he came up on, if that's what you are saying.

Q. Why is that?

[Tr. 322, R. 255]

A. If he was approaching, you know, you can't see this side, you can see the other side as he was approaching.

Q. What the side you are saying he couldn't see is the side you could see?

A. Right, we could see opposite sides.

Q. Okay, so the side he's approaching is the side that you are saying was curved in?

A. Yes, somewhat.

Q. Did you tell him that the side you are approaching is curved in?

A. No, I didn't.

Q. And I guess – why not?

A. I just didn't.

Q. Was Mr. Coleman there?

A. I'm not sure if he was there during the time Mr. Rogers threw himself back.

Q. Let's see –

A. There were a number of people around that work at U.S. Silica also.

Q. But U.S. Silica was not involved in this inspection, were they?

A. No, they were just employees.

Q. You don't even know who they are.

A. No, I don't know none of the guys, like they don't know me.

Q. All right. But so we can get it clear, on which side of the hole were you standing, the side opposite Mr. Rogers?

A. Opposite of Mr. Rogers.

* * *

[Testimony of Ronald H. Dunn, Tr. 373, R. 306]

* * *

[Tr. 386, R. 319]

* * *

Q. I understand that. Let me make sure – my question, obviously, wasn't clear. Whether or not the railroad has a side track agreement, the railroad has to comply with those requirements and standards.

A. The railroad has to have – has to comply with those standards with casing of underground pipe structures.

Q. That's right, but those standards apply to the railroad. They do not apply to U.S. Silica.

A. The railroad obviously has to know if a shipper has clandestinely or otherwise installed a pipe structure under its operating track.

* * *

[Tr. 419, R. 352]

* * *

Q. Did your investigation reveal whether this pipe was being replaced between the time whenever it was installed up until the time that Dave was hurt?

A. It had been repaired on Friday the 26th.

[Tr. 420, R. 353]

Q. Had it also been replaced on occasions according to the testimony?

A. Oh, there's ample testimony that it had been replaced on many, many occasions.

* * *

[Tr. 426, R. 359]

* * *

Q. Now here's my question. If there had been on Saturday a blowout of the slurry line that U.S. Silica had gone in and dug out enough to get a man in there to go down and patch it, then they filled it up, and then either in that same place or somewhere within a few feet of that same place, if there had been another blowout that had been let's say it had been fixed or not been fixed and the water, that is, just water had been run through that slurry line in order to clean it out, could that water and that kind of sub-strata that's out there, could that have created – water could create a hole, correct?

A. Yes, sir.

Q. In fact, couldn't it have created the type of hole that goes it's sort of like a cavern that goes back up under the surface so that the hole beneath the surface is actually bigger than the hole that you see on top of the surface?

A. And you are speaking strictly of water passing through the carrier pipe and not a slurry mix?

Q. Well, yes, sir.

A. Yes, sir, that's correct.

* * *

[Tr. 457, R. 390]

Q. Would Norfolk Southern be in violation of its own guidelines?

MR. MCMASTER: Objection.

THE COURT: Overruled.

A. In my opinion, yes.

Q. The purpose of the guidelines and the standards, Mr. Dunn, are to protect the operation of the railroad of Norfolk Southern over the industry tracks, aren't they?

A. Partially. It's also to protect the shipper's facility that is adjacent to the track so that a washout does not cause a derailment and the result being the train run into the shipper's building.

Q. All right, I know that, but it's for the safety of the operation of the train on that track to all parties?

A. All parties collectively and not one party in isolation.

Q. And the duty to see that its guidelines and its standards that it has adopted are complied with is a duty of Norfolk Southern?

A. If they had not disseminated those standards to the shipper –

Q. Yes, sir.

A. – I agree.

Q. It is Norfolk Southern's duty to see that their guidelines and standards are complied with.

A. I agree.

Q. Which would include the duty to, in fact, disseminate any information that he wants an industry side track to comply with?

A. Correct.

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[Testimony of John David Rogers, Tr. 727, R. 657]

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[Tr. 738, R. 668]

* * *

Q. How long have you been assigned to a territory that includes U.S. Silica?

A. U.S. Silica really had only been on my territory the best I recall about a year and a half.

Q. Okay and did you have a regular schedule for going out there for inspection?

A. Yes, sir, once every 30 days.

Q. Did you have a judgment or estimate or judgment based on your recollection how many times you had been to U.S. Silica as assistant track supervisor before June 28, 1993?

A. Yes, sir, I was probably there from 12 to 15 times.

Q. All right and this was before the 28th, okay?

A. Yes, sir.

Q. When you went out there, what was your job?

A. When I would go to the facility?

Q. Yes, sir.

A. It was to inspect their track to make sure our trains and our crews could operate over it safely.

Q. And what specifically were you inspecting and looking for and looking at?

A. Looking at rail conditions, the conditions, whether or not the gauge was set correct to where the train could operate over the track.

Q. Did you measure that?

[Tr. 739, R. 669]

A. Yes, sir. And looking to make sure the switch points fit up properly, they were not worn out, the frogs were in good shape, just anything that would interfere with the safe operation of the track.

Q. At any time before the 28th of June did your inspections require you to look for or to inspect pipes?

A. No, sir.

Q. Do you know of any department or any individual at the railroad that did have the responsibility of looking for and inspecting pipes at an industry like U.S. Silica? You might just wait a second. (Train coming through, a lot of noise.)

A. Would you repeat the question?

Q. Okay, do you know of any individual or department of the railroad who did have the responsibility of going out to U.S. Silica and inspecting the pipes that might run under the track?

A. The bridge and building department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff.

Q. Are you in the bridge and building department?

A. No, sir, that's a separate department.

Q. Were you ever asked to do that at U.S. Silica?

A. No, sir.

Q. And I think I may have asked you and I'm sorry if I did, did you know before June 28, 1993 of any pipe running under the industry's track there at U.S. Silica?

A. No, sir, I did not.

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[Testimony of Philip William Burke, Tr. 931, R. 856]

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[Tr. 952, R. 877]

* * *

Q. All right. Did you, in fact, handle the replacement of the line on Tuesday?

A. Yes, sir.

Q. And you replaced 140 feet?

A. Yes, sir.

Q. Tell us what is involved in replacing the 140 feet of Nypak pipe on the eight and nine line.

A. It would be dug up from starting at the beginning of the pump out to where it comes out of the ground over on the sand area going towards the cyclone.

Q. And I'm going to show you what has been marked as defendant's Exhibit Number 4. Step down here.

A. (Witness complied.)

Q. Does plaintiff's Exhibit Number 4 reflect where the eight and nine line goes into the ground?

A. Yes, sir, this is the hose that comes off here and goes into the ground and goes on out to the cyclone.

Q. All right. How far is that line that goes into the ground from the track – this is the sand track that you are looking at in plaintiff's Exhibit 4?

A. Yes, sir, this is the sand track.

[Tr. 953, R. 878]

Q. How far is the point of where that line goes into the ground to the sand track?

A. I would say probably 20 feet.

Q. Okay. Now I show you plaintiff's Exhibit Number 2 and ask you would you point out where the location was on plaintiff's Exhibit 4, which you just pointed out to the jury, I'll hold plaintiff's Exhibit 4 up.

A. This particular area right here close to the pump is right here in this particular area right here – if you notice, you can see the sand here, it would be right there.

Q. And you are pointing on plaintiff's Exhibit Number 2 to an area just east of the last rail car that you see in this photograph –

A. Yes, sir.

Q. – And on the –

A. Sand –

Q. I guess the building end of the railroad car?

A. Right.

Q. All right. And then can you determine in plaintiff's Exhibit Number 2 where the eight and nine line after it goes in the ground on plaintiff's Exhibit Number 4?

A. This is the line where it comes out of the ground right here and goes by this particular building, which is Columbia Silica's building, which goes out here to the cyclone, which would be way out here (demonstrating).

Q. And that line runs for what distance approximately?

A. Probably a quarter of a mile.

[Tr. 954, R. 879]

Q. All right. And as you approach the end of the eight and nine line out at what we call the cyclone that's been referred to before what would you see if you looked in the direction of the cyclone?

A. You would see the sand pipe where the cyclone –

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[Motion for Directed Verdict Colloquy, Tr. 984, R. 906]

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[Tr. 986, R. 908]

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THE COURT: They have a duty under the FELA to maintain a safe working place for their employees, don't they?

MR. MCMASTER: Yes, sir, they do. They do that, but, again, there must be some evidence of negligence.

THE COURT: Well, isn't there facts in which it could be inferred that they breached their duty to require the co-defendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?

MR. MCMASTER: I think Mr. Dunn said that or something like that.

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[Jury Charge, Tr. 1074, R. 996]

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[Tr. 1083, R. 1005]

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[THE COURT:] I charge you, Madam Forelady and ladies and gentlemen, under the Federal Employers Liability Act negligence on the part of the defendant railroad or its agents, servants or employees is a legal cause of injury or damage to cause plaintiff's employees when the negligence played any part in producing plaintiff's injuries. In other words, as stated in the Federal Employers Liability Act statute, defendant railroad is liable for plaintiff's injuries resulting in whole or in part from the negligence of any of the officers, agents or employees of the railroad.

I charge you before defendant can be charged – railroad can be charged with the negligence in failing to provide a reasonably safe place to work plaintiff must prove that the defendant railroad knew or in the exercise of ordinary care should have known that an unsafe condition existed and had a reasonable opportunity either to warn the plaintiff of such condition or to remedy the same.

I charge you the defendant railroad – a defendant railroad has the duty to exercise reasonable care to provide plaintiff with a reasonably safe place in which to work.

* * *

[Tr. 1086, R. 1008]

* * *

[THE COURT:] Madam Forelady, ladies and gentlemen, I charge you it is the duty of the railroad to use ordinary care and prudence in furnishing its employees a reasonably safe place in which to work and to use reasonable precaution to maintain and keep such place in a reasonably safe condition commensurate with the amount of danger which the railroad knew or in the exercise of due care should have known existed in the place where its

employees work. I charge you this duty is continuing and is non-delegable.

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[Objections to Jury Charge Colloquy, Tr. 1101, R. 1023]

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[Tr. 1104, R. 1026]

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[MR. JOHN MCMASTER:] We also object to the Court's failure to charge the requested charges, which we submitted to the Court, which we maintain are proper statements of the law with the exception of those pertaining to punitive damages, which have no bearing or place in this case.

THE COURT: Well, you understand I charged a couple of yours verbatim, Mr. McMaster?

MR. JOHN MCMASTER: Yes, sir.

THE COURT: All right, thank you. I note your exceptions.

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